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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. [redacted] 50

EINAR RASMUSSEN, *Petitioner*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JACK WASSERMAN,
Attorney for the Petitioner,
Warner Bldg.,
Washington 4, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.

EINAR RASMUSSEN, *Petitioner*

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HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia reversing for lack of jurisdiction a judgment of the District Court declaring that petitioner is eligible for American citizenship and is a permanent resident of the United States.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 7 of Appendix B herein. The opinion of the Court of Appeals is not yet reported and is set forth at page 9 of Appendix B herein.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Is a declaratory judgment action instituted in 1948 maintainable under *McGrath* v. *Kristensen*, 340 U.S. 162 (1950) and *Heikkila* v. *Barber*, 345 U.S. 229 (1953) to review an order of deportation where the issue presented is eligibility for American citizenship and where the Court of Appeals previously held in the same case that there was jurisdiction?

2. Is the doctrine of the law of the case applicable herein or may the Court of Appeals reverse its prior determination as to the existence of jurisdiction in this litigation which has now been pending for seven years?

Statutes Involved

The applicable statutes are set forth in Appendix A herein at page 6.

Statement

Petitioner is a native and citizen of Denmark and is the husband of an American citizen. His two minor step-children and his wife depend upon him for support. Petitioner came to the United States illegally on August 6, 1929. On April 26, 1943 he advised his draft board that he desired to serve in our armed forces if he could become an American citizen, otherwise he did not. He was erroneously advised by his draft board that because of his illegal entry he could not become a citizen by army service. He thereupon claimed exemption from service as a neutral alien pursuant to 50 U.S.C. App. 303(a). A few months later, on October 4, 1943, when the war was still raging and before the Battle of the Bulge, petitioner discovered that he could become a citizen by entering the armed forces. He submitted to induction and was rejected on physical grounds.

In 1944 after the institution of deportation proceedings, petitioner was granted permission to proceed to Canada in order to adjust his immigration status pursuant to a pro-

cedure known as preexamination (8 C.F.R. 1949 Ed. Part 142). On January 16, 1946 an appropriate immigration visa was issued to him and he reentered the United States as a permanent resident. In 1947 the Immigration authorities asserted that they made a mistake readmitting petitioner for permanent residence, that he was ineligible to citizenship pursuant to 50 U.S.C. App. 303(a), was therefore inadmissible for permanent residence under 8 U.S.C. 213 and was accordingly deportable. The present deportation order was entered on June 30, 1948 upon this theory.

The present action was instituted on July 30, 1948. The complaint was dismissed in the District Court for lack of jurisdiction on the contention that habeas corpus was the exclusive remedy. Upon appeal the Court of Appeals on February 6, 1951 reversed upon the basis of *McGrath* v. *Kristensen*, 340 U.S. 162 (1950).

The District Court, thereafter, following the mandate of the Court of Appeals upheld the maintenance of this action for declaratory judgment. The District Court further held that petitioner was not subject to deportation, holding that as a citizen of a country which was not neutral, he did not incur the disability of citizenship ineligibility under 50 U.S.C. App. 303(a). In view of this ruling, the issue of mistake induced by the draft board officials was not considered by the District Court.

The Court of Appeals reversed the District Court and its own prior determination herein that a declaratory judgment was maintainable and upon the authority of *Heikkila* v. *Barber*, 345 U.S. 229 (1953) remanded the cause to the District Court with directions to dismiss the complaint (filed herein in 1948) for lack of jurisdiction.

Reasons for Granting the Writ

1. The decision below is in conflict with *McGrath* v. *Kristensen*, 340 U.S. 162 (1950) and *Heikkila* v. *Barber*, 345 U.S.

229 (1953) which expressly acknowledge that eligibility for American citizenship is an issue which may be the subject of declaratory judgment. The importance of this issue in the administration of the immigration and nationality laws is attested by the frequency with which this issue has been recently presented to this Court. Many cases pending in the lower courts await clarification as to the scope of declaratory judgment review in immigration and nationality cases.

2. More vital to the administration of justice, is the issue as to the extent to which issues may be relitigated in the same case before the Court of Appeals. The same public policy which calls for a terminal point in litigation and expresses itself as *res judicata* (*United States* v. *Munsingwear*, 340 U.S. 36 (1950)) likewise calls for the invocation of the doctrine of the law of the case. Here, in 1951, the Court of Appeals ruled that there was jurisdiction reversing the District Court. No application was filed for certiorari. Then after the District Court obeyed the mandate of the Court of Appeals and assumed jurisdiction and rendered a judgment in favor of the petitioner, the Court of Appeals reversed its prior determination and dismissed the cause for lack of jurisdiction. Thus, seven years after the institution of this litigation, the petitioner is in the same position as though he never filed suit, in view of the Court of Appeals' determination to disturb an issue previously settled in this case.

The decision below in its refusal to follow the law of the case and terminate relitigation of decided issues is contrary to decisions of this Court and other Circuits. *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U.S. 451 (1897); *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912); *City of Sedalia* v. *Shell Petroleum Co.*, 81 F. 2d 193 (C.A. 8, 1936); *Chicago St. P. M. & O. Ry. Co.* v. *Kulp*, 102 F. 2d 352 (C.A. 8, 1939) *cert. denied* 307 U.S. 636; *Wyant* v. *U.S. Fidelity & Guaranty Co.*, 116 F. 2d 83 (C.A. 4, 1940) *cert. de-*

nied, 314 U.S. 610; *Ford Motor Co.* v. *Hotel Woodward Co.,* 271 Fed. 625 (C.A. 2, 1921) *cert. denied,* 256 U.S. 698; *Lederer* v. *Real Estate Title Insurance & Trust Co., of Philadelphia,* 273 Fed. 933 (C.A. 3, 1921); Jurisdictional issues once litigated may not be retried. *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938).

Conclusion

For the reasons noted above, it is respectfully submitted that a writ of certiorari should issue and that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JACK WASSERMAN,
Attorney for Petitioner,
Warner Bldg.,
Washington 4, D. C.

APPENDIX A

Statutes Involved

Section 3(a), Selective Training and Service Act of 1940, as amended, 54 Stat. 885 (1940), as amended, 50 U.S.C. App. § 303(a) (1946) provides in part:

> Except as otherwise provided in this Act, every * * * male * * * person residing in the United States, who is between the ages of eighteen and forty-five * * * shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 13(c), Immigration Act of 1924, as amended, 43 Stat. 161 (1924), as amended, 8 U.S.C. § 213(c) (1946) provides in part:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant * * *, or (3) is not an immigrant as defined in section 203 of this title.

APPENDIX B

RULING FROM THE BENCH BY THE HON. ALEXANDER HOLTZOFF, JUDGE, ON MOTION FOR DECLARATORY JUDGMENT

Washington, D. C., Thursday, May 14, 1953

Robert I. Thiel, Official Reporter

The Court. The Court has had considerable hesitancy and reluctance in attempting to determine the merits of this litigation, because subsequent to the time when it was instituted the Supreme Court held that an action for a declaratory judgment will not lie to determine the validity of an order of deportation.

The Court upon reflection, however, determined to keep this case and decide it on the merits in view of the fact that after it was dismissed in this Court it was remanded by the Court of Appeals for trial. Even though that order of remand was made on consent, nevertheless, the Court is inclined to the view that it is binding on this Court and constitutes the law of the case.

This brings us to the real question at issue. The plaintiff made a claim for exemption from Selective Service as a citizen of a country alleged to be neutral in World War II, namely, Denmark. The Selective Service Act permitted citizens of neutral countries to make a claim for deferment on the ground that they were such citizens. The Selective Service Act provided, however, that a person who makes such a claim ceases to be eligible for naturalization.

The plaintiff's deportation has been ordered on the ground that by making the foregoing claim he became ineligible to citizenship and thereby ineligible to remain in the United States as a permanent resident.

It is claimed by the plaintiff that Denmark was not in fact a neutral country but for some purposes it was an enemy country and for others an allied and associated power, thus being in a somewhat anomalous state.

The Government claims that the Court may not review this point in view of the fact that it was not raised before the Immigration authorities.

The pretrial memorandum clearly indicates, however, that this issue was raised by the plaintiff at pretrial, that it was met by the defendant at pretrial and that no contention was made that the issue was not available or open. The Court is bound by the pretrial order, and therefore the conclusion necessarily follows that this issue is open for decision.

Ordinarily, the question whether a foreign power is a neutral or not is a political question to be determined by the President of the United States or the Secretary of State. In this instance, however, the State Department has failed to make a determination of this question. In fact, the conclusion seems inescapable that the State Department carefully and deliberately refrained from making an open declaration on the question whether Denmark should be or should not be regarded as a neutral. For the purposes of the Trading-With-the-Enemy Act Denmark was regarded as an enemy country.

Since the Executive Branch of the Government has not made a formal declaration or a formal decision on this question, which may be deemed to be a political one, the Court has to decide it as a question of fact, and it must do so as it would determine any other fact presented to it for decision.

The parties have stipulated the evidentiary facts on the basis of which the Court may make its decision. The Court reaches the conclusion, on the basis of the stipulated facts, that Denmark was not a neutral country. If it was not a neutral country, it necessarily follows that the provision of the Selective Service Act on which the Government relies for depriving the plaintiff of eligibility for citizenship is not applicable. It may well have been erroneous for the

Selective Service authorities to grant the plaintiff's claim for exemption as a citizen of a neutral country, because he was a citizen of a country that was not neutral. But, be that as it may, the drastic penalty of loss of eligibility for citizenship may not attach to the plaintiff's claim of citizenship in a neutral country and to the grant of that claim of exemption, because in fact Denmark was not a neutral country.

In view of these circumstances, the Court will render judgment in favor of the plaintiff. You may present proposed findings of fact and conclusions of law, and proposed judgment.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11928

• • • • • • •

Before EDGERTON, FAHY and WASHINGTON, *Circuit Judges.*

Per Curiam: This is an action for a declaratory judgment, seeking review of an order of deportation. The Government appeals from a judgment for the plaintiff, who is an alien not claiming American citizenship.

The District Court is without jurisdiction to review the order complained of other than in a habeas corpus proceeding. *Heikkila* v. *Barber,* 345 U.S. 229, 235 (1953). This court's order of February 6, 1951, granting a Government motion to remand the case to the District Court for trial, was based on the theory that the decision in *McGrath* v. *Kristensen,* 340 U.S. 162 (1950), would support jurisdiction in the present case. We think the later decision in Heikkila shows this to have been a mistake, and that our pre-

vious order has not become the law of the case which we are required to perpetuate. See *White* v. *Higgins*, 116 F. 2d 312 (1st Cir. 1940). The case must be remanded to the District Court with directions to vacate the judgment and dismiss the action. *Zank* v. *Landon*, 205 F. 2d 615 (9th Cir. 1953).

So Ordered.

(1183-3)

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 733

EINAR RASMUSSEN, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 9-10) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1955. The petition for a writ of certiorari was filed on April 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether an order for the deportation of petitioner on the ground that he was ineligible for citizenship at the time of his last entry, issued prior to the effective date of the Immigration and Nationality Act of 1952, may be attacked in a declaratory judgment action.

STATUTES INVOLVED

Section 3(a) of the Selective Service Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303(a) provided in part:

> Except as otherwise provided in this Act, every * * * male person residing in the United States, who is between the ages of nineteen and forty-five * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

Section 13(c) of the Immigration Act of 1924, as amended, 8 U. S. C. (1946 ed.) § 213(c) provided in part:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant * * * , or (3) is not an immigrant as defined in section 203 of this title.

STATEMENT

In July, 1948, petitioner brought an action in the United States District Court for the District of Columbia seeking a declaration that an order of deportation previously issued against him was null and void, and that he was not barred from citizenship (R. 1-3). The complaint alleged and the Government admitted (R. 5-6) that petitioner, a native and citizen of Denmark, had entered the United States on August 6, 1929—illegally, as the District Court found and petitioner acknowledged (R. 12, 25); that in April, 1943, petitioner had executed D.S.S. Form 301 claiming exemption from military service as a national of a neutral country; that in October, 1943, he had submitted a request for withdrawal of such form and indicated his willingness to serve in the armed forces; that thereafter he was classified 1-A but was rejected as physically unfit; that in March, 1944, he was granted permission to adjust his status through preexamination and voluntary departure; that in January, 1946, he was admitted to the United States for permanent residence, but in April, 1947, deportation proceedings were instituted against him on the ground that he was

ineligible to citizenship by virtue of the filing of the D. S. S. Form 301, and therefore inadmissible at the time of his entry in January, 1946; and that in June, 1948, he was ordered deported.

The District Court dismissed the complaint for lack of jurisdiction. On appeal, upon consent of the Government and on the authority of *McGrath* v. *Kristensen,* 340 U. S. 162, the cause was remanded to the District Court for hearing.

Before the cause came on for trial in the District Court, this Court held in *Heikkila* v. *Barber,* 345 U. S. 229, that, under the Immigration Act of 1917, deportation orders were reviewable only by habeas corpus. The District Court, however, felt bound by the mandate of the Court of Appeals to determine the action on the merits (R. 9-10; Pet. App. 7-9). In May, 1953, it ruled that petitioner was not subject to deportation and was not, at the time of his entry, ineligible to citizenship for the reason that, on April 26, 1943, when petitioner executed D. S. S. Form 301, Denmark was not a neutral country (R. 9-11, 12-13; Pet. App. 7-9). On appeal by the Government, the Court of Appeals remanded the cause with directions to vacate the judgment and dismiss the action, holding that under *Heikkila* v. *Barber,* 345 U. S. 229, the District Court had no jurisdiction (Pet. App. 9-10).

DISCUSSION

Since the decision of the Court of Appeals in the instant case, this Court has held, in *Shaughnessy* v. *Pedreiro,* No. 374, this Term, decided April 25, 1955, that under the Immigration and Nationality

Act of 1952 deportation orders issued after the effective date of that Act are reviewable by actions for a declaratory judgment. That decision, however, does not open up for review other than by habeas corpus deportation orders issued prior to the enactment of the 1952 Act. See *Heikkila* v. *Barber*, 216 F. 2d 407 (C. A. 9), certiorari denied, May 16, 1955, No. 528, this Term. On the issue of jurisdiction in a pending case, the Court of Appeals was under a duty to apply the correct law as enunciated by this Court, and therefore to hold that the District Court lacked jurisdiction. Cf. *Tom We Shung* v. *Brownell*, 346 U. S. 906, where this Court required that a complaint be dismissed on the authority of the *Heikkila* decision, although the Court of Appeals had affirmed the decision of the District Court on the merits.

It is true that petitioner's attack on the deportation order raises an issue of his eligibility to citizenship at the time of his last entry into the United States which could have been raised by a declaratory judgment action before issuance of the deportation order, when his application for discretionary relief was not considered on the ground that he was not eligible therefor.* *McGrath* v. *Kristensen*, 340 U. S. 162. However, by his present action, petitioner is attacking, not the refusal to consider his application for discretionary relief, but the final order of deportation. When this action was

* The Department of Justice files reveal that both the Acting Commissioner and the Board of Immigration Appeals had ruled that, in view of their findings that petitioner was ineligible to citizenship, they were powerless to grant suspension of deportation.

first before the Court of Appeals we were of the view that under *McGrath* v. *Kristensen* petitioner could invoke the declaratory judgment remedy to test the question of status—*i. e.*, his ineligibility to citizenship—which was the basis for his deportation. Thereafter, however, in *Heikkila* v. *Barber*, 345 U. S. 229, at 236-7, this Court indicated that the rule of *McGrath* v. *Kristensen* would be confined to cases which did not involve "an outstanding deportation order." On this view we urged on the second appeal, and the Court of Appeals agreed, that there was no jurisdiction of the present action since an order for deportation had been previously issued.

It should be noted that the ruling of the court below does not deprive petitioner of the right to litigate the issue of the validity of the deportation order by habeas corpus and that the question is not one of continuing importance since as to orders issued after the effective date of the 1952 Act the *Pedreiro* decision will govern.

The Government has no desire, however, to delay unnecessarily a decision on the basic issue in this case. If this Court is of the view that jurisdiction exists under the *Kristensen* decision, because the underlying issue is one of status, then we suggest that the petition for a writ of certiorari should be granted and the cause remanded to the Court of Appeals for consideration on the merits.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JUNE, 1955.

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